U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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File: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 04 2009

SRC 08 013 52380

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

for John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer software developer and consultancy firm. It seeks to employ the beneficiary permanently in the United States as a senior project manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered did not require a member of the professions holding an advanced degree.

On appeal, the petitioner submits a brief and minutes from a liaison meeting between the Nebraska Service Center and the American Immigration Lawyers Association (AILA). For the reasons discussed below, we uphold the director's decision.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien

> qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.)

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, Part H, line 4, of the alien employment certification reflects that a Master's degree is the minimum level of education required. Line 8 reflects that a combination of education or experience is acceptable in the alternative. Lines 8-A through 8-C allow an employer to specify the combination of education and experience that is acceptable. Line 8-A requests the minimum alternative education level. An employer must respond by checking one of the following boxes: "None," "High School," "Associate's," "Bachelor's," "Master's," "Doctorate" or "Other." The petitioner did not select any of the specific degrees. Rather, the petitioner selected "Other." Line 8-B requires the employer to clarify "Other." The petitioner responded: "Any suitable combination of education, training, or experience is acceptable." On Line 8-C, the petitioner indicated that two years of experience is required in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable.

U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS' interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

On appeal, the petitioner cites *Matter of Demos Consulting Group, Ltd.*, 2007-PER-00020 (BALCA 2007) for the proposition that the phrase "any suitable combination of education, training or

experience is acceptable" is required by DOL when the employer will accept alternative job requirements. The petitioner then cites AILA Liaison Meeting at the Nebraska Service Center minutes for the proposition that USCIS accepts that the language on Line 8-B of the ETA Form 9089 requires a combination of education and experience that is equal to or greater than the primary job requirements.

The AILA liaison meeting minutes include a question from AILA noting that the Nebraska Service Center has concluded that the language "any suitable combination of education, training or experience" will not disqualify an alien from qualifying under section 203(b)(2) of the Act but acknowledging that when considering the language in a petition filed pursuant to section 203(b)(3) of the Act, which includes skilled workers, the language "will not be effective in defining an alternative degree requirement." We reemphasize that the question was phrased by AILA, not the Nebraska Service Center. The ultimate question and subsequent answer deal with what language will satisfactorily allow a petition to be considered in the skilled worker context. Nothing in the question or answer suggests or implies that for petitions filed under section 203(b)(2) of Act, the employer need not specify the alternative minimum requirements beyond the language used by the petitioner in this case. Rather, AILA's question assumes that qualifying those alternative minimum requirements with the language quoted above will not, by itself, prevent the petition from being considered under section 203(b)(2) of the Act.

Regardless, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (an agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

The language used by the petitioner on Line 8-B of the ETA Form 9089 derives from 20 C.F.R. § 656.17(h)(4), which provides:

> (i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
>
> (ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

In explaining this provision, DOL provided the following commentary, published at 69 Fed. Reg. 77353 (Dec. 27, 2004):

> Under § 656.17(h)(4) of this final rule, an employer may specify alternative requirements provided the alternative requirements meet the criteria set forth by [the Board of Alien Labor Certification Appeals (BALCA) in [*Matter of Francis Kellogg,* 94-INA-465 (BALCA 1998)]. In *Kellogg*, BALCA indicated that alternative requirements and primary requirements must be substantially equivalent to each other with respect to whether the applicant can perform the proposed job duties in a reasonable manner. There may also be other equally suitable combinations of education, training or experience which could qualify an applicant to perform the job duties in a reasonable manner, but which the employer has not listed on the application as acceptable alternatives. Therefore, even when the employer's alternative requirements are substantially equivalent but the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, the alternative requirements will be considered unlawfully tailored to the alien's qualifications unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable.

This language, especially the language in the last two sentences, unambiguously explains that the specific alternative job requirements should be stated on the ETA Form 9089 and where the alien is already working for the petitioner and only meets the alternative job requirements, the employer must *also* state that any suitable combination of education, training or experience are acceptable in order for DOL to conclude that the actual alternative job requirements listed were not unlawfully tailored to the alien's qualifications.

A basic reading of the ETA Form 9089 and its instructions leads to the same conclusion. As stated above, Lines 8-A through 8-C require an employer to specify its alternative job requirements, even inquiring as to the specific degree required in the alternative. Moreover, the instructions to the form, Line 8, provide: "For example, if the requirement is bachelors + 2 years experience but the employer will accept a masters + 1 year experience, an alternative combination of education and experience exists." The instructions for Line 8-A state: "If the answer to question 8 is *Yes,* select the alternative level of education that is acceptable in combination with the number of months of experience specified in question 8-C."

Nothing in the BALCA case cited by the petitioner suggests any other interpretation. BALCA cited the commentary published in the Federal Register quoted above and concluded:

> Thus, section 656.17(h)(4)(ii) was clearly intended to implement in the PERM regulations the pre-PERM ruling in *Francis Kellogg,* 1994-INA-465 and 544, 1995-INA-68 (Feb. 2, 1998) (en banc), that "where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements

> are unlawfully tailored to the alien's qualifications, in violation of [the pre-PERM regulation at § 656.21(b)(5)], unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable."
>
> Our review of the job requirements in this case compared with the Alien's background indicates that the job requirements were largely tailored to the Alien's qualifications.

Matter of Demos Consulting Group, Ltd., 2007-PER-00020 at 7. BALCA did not suggest that the employer in that case erred in listing the specific alternative job requirements. Rather, BALCA found those requirements tailored to the alien's qualifications because the employer did not *also* indicate that any suitable combination of education, training or experience are acceptable.

DOL's role is to determine whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a). Section 212(a)(5) determinations are not subject to review by USCIS absent fraud or willful misrepresentation. *Madany v. Smith*, 696 F.2d at 1012-1013. *See also Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984).

Thus, it is not within our jurisdiction to question the approval of the alien employment certification in this case. That said, while DOL may be willing to *accept* the broad language used by the petitioner on Line 8-B in lieu of specific alternative job requirements, based on the extensive language quoted above, DOL clearly does not *require* the employer to omit the actual alternative job requirements so long as the petitioner qualifies those requirements with the language specified at 20 C.F.R. § 656.17(h)(4)(ii).

We acknowledge in this case that the petitioner was required to use the language specified at 20 C.F.R. § 656.17(h)(4)(ii) because the beneficiary does not appear to meet the primary education job requirements, a Master's degree, and was already working for the petitioner. While the petitioner submitted an evaluation equating the beneficiary's Indian Master's degree from the University of Pune to a U.S. Master's degree, the petitioner acknowledges on appeal that the beneficiary does not meet the primary job requirements. While not a basis of denial in this matter, we simply note that the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO) equates a two-year Indian Master's degree following a three-year Indian baccalaureate with a U.S. baccalaureate.[1] Thus, while

[1] AACRAO, according to its website, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." AACRAO, http://www.aacrao.org/about/ (last accessed December 4, 2008) (copy incorporated into the record of proceeding). Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." *Id.* According to the login page, EDGE is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. Dale E.

the beneficiary has five years of post-baccalaureate experience and therefore qualifies as a member of the professions holding an advanced degree, he does not meet the primary job requirements specified on the ETA Form 9089.

While the petitioner may have been obligated to use the language set forth in 20 C.F.R. § 656.17(h)(4)(ii) based on the provisions in that regulation, the petitioner was not precluded from specifying the actual minimum alternative job requirements. On line 8-B, the petitioner explicitly selected "Other" rather than "Bachelor's." The petitioner also indicated that only two years of experience were required in combination with the unspecified "Other" degree. As the petitioner did not indicate that the job required at least a Bachelor's degree plus five years of post-baccalaureate experience, we must uphold the director's conclusion that the job does not require a member of the professions holding an advanced degree.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

This denial is without prejudice to the filing of a new petition under a lesser classification.

ORDER: The appeal is dismissed.

Gough, Director of International Education Services, "AACRAO EDGE Login," http://aacraoedge.aacrao.org/index.phpp (last accessed December 4, 2008) (copy incorporated into the record of proceeding).

Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf . If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12. (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf (accessed December 4, 2008 and incorporated into the record of proceedings). If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.